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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

JESSE WOODROW SHOTTS,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court will allow a decision that is contrary to the settled rule in the Federal Courts that an amendment to the indictment that broadens the possible bases for conviction beyond those presented by the grand jury is error per se and must be corrected.

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PRIOR OPINIONS

The opinion of the Court of Appeals for the Eleventh Circuit in "Shotts 1" is reported at 145 F.3d 1289 and is reproduced in the Appendix at App. 1. The Order denying the Petition for Rehearing in "Shotts 1" is unreported and is reproduced at App. 30. The Order denying the Petition for a Writ of Certiorari in "Shotts 1" is reported at 119 S.Ct. 1111, and is reproduced at App. 35. The opinion of the Court of Appeals for the Eleventh Circuit in "Shotts 2" is unreported and is reproduced in the Appendix at App. 36. The Order denying the Petition for Rehearing in "Shotts 2" is unreported and is reproduced at App. 47.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals in "Shotts 2" was filed on November 29, 2000. Appellant filed a timely petition for rehearing with suggestion for rehearing en banc which was denied by Order filed on April 17, 2001.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL ISSUES INVOLVED

U.S. Const., Amend. V. provides, in relevant part:

> No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury....

STATEMENT OF THE CASE

The well settled rule in Federal Court in that the Fifth Amendment to the United States Constitution prohibits amendment of an indictment that broadens the bases of conviction except by resubmission to the grand jury. The Court

of Appeals for the Eleventh Circuit in "Shotts 2" redefined constructive amendment to: "change".

The opinion holding that; "even if some change was made to the terms of the indictment, the terms affect a part of the indictment unnecessary to the allegations of the offense proved", App. 41, ignores the totality of the proceedings and the indictment as a whole. Shotts was convicted of perjury (Count 26) while denying ownership of a bail bond business. The issue of ownership of the bail bond business was integral to the prosecution of every count of the indictment. Every count of the indictment was connected directly or indirectly to the issue of ownership. The mail fraud was predicated upon the theory that Shotts was the owner of the bail bond business and the affidavit to the Clerk of the Jefferson County Circuit Court that Shotts had no interest in the bail bond business was a fraud. The bribery counts were based upon the theory that Shotts was the owner and was obtaining blank bonds to prevent exposure of his bonding business to any forfeitures. The obstruction of justice counts were based upon the theory that Shotts was hiding evidence and preventing testimony to prevent his ownership from becoming exposed. Appellant concedes that ownership of the bail bond business is not a statutory element of § 1512 (b), but, to isolate the concept of ownership as being an unnecessary allegation to the offense proved puts the remaining obstruction counts in a vacuum as if not related to the totality of the pleadings, proof, jury charges, and the findings of both the grand jury and the petit jury.

This case provides this Court with an opportunity to clarify that constructive amendments by any tribunal that broadens or broadened the bases of conviction are per se prejudicial and not subject to harmless error analysis. Constructive Amendments are structural defects that are not subject to harmless error analysis and require correction to prevent convicting a defendant of an unindicted crime.

Defendant Jesse W. Shotts was a criminal defense attorney in Birmingham, Alabama, who also owned a bail bond business. After the Alabama Supreme Court promulgated a rule

that precluded an attorney from having an interest in a bail bond business, Shotts closed his corporation, but continued to manage a newly formed corporation in which he no longer held any shares. A few years later, the FBI began an investigation of Jack Montgomery, a state court judge, with whom Shotts had a professional relationship.

In November, 1995, Shotts was indicted and charged with conspiracy to commit mail fraud[1], fifteen counts of substantive mail fraud, five counts of bribery (involving Judge Montgomery), one count of perjury before a grand jury, and five counts of "tampering" in violation of 18 U.S.C. § 1512(b).

After a jury trial, Shotts was convicted of the conspiracy, of the mail frauds, of two counts of "tampering," and of perjury. He was acquitted of all counts of bribery and three counts of tampering were either dismissed by the government or by the court.

On appeal, the Court of Appeals for the Eleventh Circuit vacated the conspiracy, mail frauds, and perjury convictions[2]. The Court, however, upheld the two "tampering" convictions.

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[1] The conspiracy and mail fraud counts charged two distinct schemes as a unitary scheme to defraud. The first "scheme" alleged that Shotts engaged in a scheme to obtain property -- municipal licenses to operate a bail bond business -- by filing false certifications about who owned the business. The second "scheme" alleged that Shotts obtained bail bonds signed in blank by Judge Montgomery and then obtained fees from customers of the bail bond business upon the false representation that the company would be a surety on the bonds.

[2] The Court vacated the conspiracy and mail fraud convictions because, under Alabama law, a municipal license to operate a bail bond business is not property, so the mailing of an application to obtain a municipal license, or the receipt of the license in the mail, could not support a federal mail fraud conviction. (App. 15) The Court reversed the perjury conviction on the ground that Shotts' testimony before the grand jury that he did not own a bail business was "literally true." (App. 20)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT A DECISION THAT IS CONTRARY TO CONSTITUTIONAL PRECEDENT OF THE SUPREME COURT SINCE 1886.

The Indictment has a 7 paragraph beginning titled:

INTRODUCTION

This Introduction states that for each count of this, Indictment, the Grand Jury Charges that . . . .

Further, each Count of the Indictment is preceded by: The Grand Jury realleges the Introduction. . . .

Paragraph 4 of the Introduction alleges:

> In or about 1990, SHOTTS, through agents and nominees, created a bailbonds business named J.C.'s Bail Bonds. He owned and operated this bailbonds business, through agents and nominees, until it closed in or about 1993. His involvement in the bailbonds business was in violation of state law and court rules.

The decision of "Shotts 1" judicially amended the indictment to read:

4. In or about 1990, Shotts created a bailbond business named J.C.'s Bail Bonds. It closed in or about 1993.

"Shotts 1" eliminated the theory of agents and nominees being the manner of creation, ownership, and operation. The only aspect that was a violation of state law and court rules was ownership by Shotts. Having satisfied the ownership issue as contrary to Alabama Law and the general law, violation of state law and court rules was judicially removed from the indictment.

"Shotts 2" classified this removal as a change which is synonymous with amendment, the accepted legal definition of broadening an indictment to increase the bases for conviction.

The panel in "Shotts 2" relied upon United States v. Miller, 471 U.S. 130, 136 (1985) citing Ford v. United States, 273 U.S. 593 (1926) as authority if an unclear averment is included in the indictment. This reliance is misplaced for that the specific holdings of Miller and Ford require that the portion is unnecessary to and independent of the allegations. Only innocuous immaterial surplusage may be rejected as an unclear averment in an indictment. Whenever the indictment includes material allegations that are not necessary elements of the offense and these allegations are submitted to the jury on a defective basis, jury instruction on a defective basis, and determined by the petit jury on erroneous law and fact; these averments are essential to the indictment and the deletion of such averments is unequivocally an amendment.

The amendment to the indictment broadened the bases for conviction which in per se prejudicial and requires reversal. Miller i.d. overruled Ex parte Bain, 121 U.S. 30 L.Ed 849, 7 S.Ct. 781 (1886) (which prohibited any change to an indictment) but only to the extent that its rule would support nullifying an indictment that has been narrowed by amendment:

> "[W]e do not limit Bains more general proposition concerning the impermissibility of actual additions to the offenses alleged in an indictment, a proposition we have repeatedly reaffirmed. Miller, 138-140.

A jury instruction that constructively amends grand jury indictment constitutes per se reversible error because such an instruction violates a defendant's constitutional right to be tried on only those charges presented in a grand jury indictment and creates the possibility that the defendant may have been convicted on grounds not alleged in the indictment. Stirone v. United States, 361 U.S. 212, 217-18, 80 S.Ct. 270, 273-74, 4 L.Ed.2d 252 (1960). The Panel ruling in "Shotts 1" constitutes

a judicial amendment and is per se prejudicial because it "directly infringes the defendants right to know the charges against him." Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

Shotts is analogus to Stirone but for the Circuit Court amending the indictment. Shotts has been found guilty upon an erroneous theory of law and fact that the District Court submitted to the petit jury. Stirone required the reviewing court to conclusively presume that the defendant has been prejudiced by the constructive amendment and to forgo harmless error analysis. Stirone unequivocally held that such error can never be declared harmless and has not been overruled, either explicitly or implicitly.

The Court has ruled that certain constitutional violations are amenable to harmless error analysis beginning with Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993), however, in a case like Shotts, where the error amounts to a structural defect that renders irrelevant, ab inito the question of prejudice, it is error per se and must be corrected.

Shotts has been convicted in a Federal Court for a crime which he was never indicted by a grand jury. The petit jury's determination could be the result of a misinformed or misplaced findings of fact and law. Convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceeding is most serious and cannot be tolerated. For over two hundred years, persons accused of a federal crime have had a absolute constitutional right to a grand jury indictment. Stirone itself was, of course, an affirmation of that right in the strongest possible terms. In the law, one of our most time-honored codes is that of *stare decisis*, present in this case both by virtue of the unequivocal language of the Constitution, and by Stirone's condemnation, now over thirty years past, of ever sustaining a conviction for an unindicted crime. No court could choose to consciously

ignore all that has gone before while simultaneously maintaining the integrity of the law.

The Court should take this opportunity to include Circuit Court Constructive Amendments to the protection of Stirone that such error is per se prejudicial. The Petition for a Writ of Certiorari should be GRANTED.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

Jesse Woodrow SHOTTS, Defendant-Appellant.

No. 96-6634.

United States Court of Appeals,
Eleventh Circuit.

July 10, 1998.

Before BLACK, Circuit Judge, and HILL and HENDERSON, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Jessee W. Shotts appeals his convictions and sentences on various counts of mail fraud and obstruction of justice. For the following reasons, we affirm in part and reverse in part.

I.

Jessee W. Shotts is a criminal defense attorney in Birmingham, Alabama. In the 1980's, he also ran a bail bond business called J & J Bonding Co. In 1990, the Alabama Supreme Court promulgated a rule that prohibited attorneys from having an interest in a bail bond business. Shotts closed J & J Bonding Co., and a new corporation called JC Bail Bonds, Inc. ("JC") was formed. Shotts' wife, Jerri Grant, was the sole shareholder. Subsequently, she transferred her shares to Donald Long, who later transferred his shares to David Pettus. At no time did Shotts own any stock in JC.

Shotts directed his secretary, Kandy Kennedy, to mail applications and money to various municipalities to obtain licenses for the business. These applications named Long as the owner of the business. Shotts also directed Kennedy to prepare the annual certification, which stated that Long was the owner of the company and that no lawyer had any interest in the company.

The new firm began to operate in the fall of 1990. On three occasions, Shotts took Long to Judge Jack Montgomery's house. Montgomery was a state district court judge in Birmingham. On each occasion, Shotts would go into Judge Montgomery's house alone and return with bonds signed by Montgomery, but otherwise blank. Shotts referred to these pre-approved bonds as "Jack" bonds. They were used as appearance bonds by JC, but without showing JC as the surety. If the defendant did not appear in court as required, JC had no liability on the bond.

In 1992, the Federal Bureau of Investigation (FBI) began an investigation into allegations of corruption on the part of Judge Montgomery and obtained a wire tap of his home phone. In late 1992, the FBI intercepted a phone call from Shotts to Judge Montgomery in which Shotts asked him to sign a bond for a prisoner in another county. When Montgomery responded that he didn't know if he could sign the bond because he had no jurisdiction in that county, Shotts said he "had 5,000 reasons to try." Montgomery then told Shotts to come to his house.

That evening, the FBI executed a search warrant on Judge Montgomery's house. They found $31,000 in the house. The next day, Montgomery resigned from office. [FN1]

> FN1. Montgomery was subsequently indicted and pled guilty, but was killed by a gunshot before he was sentenced. This case, however, concerns only allegations of mail fraud, perjury and obstruction of justice.

After the search of Montgomery's house, Shotts was called to testify before a grand jury investigating Montgomery. He was asked whether he owned JC Bail Bonds, Inc. He answered that he did not. He was also asked whether he had any interest in or was associated with a bail bond business, but he invoked his Fifth Amendment privilege and refused to answer.

In November of 1995, Shotts was indicted and charged with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1) and fifteen counts of substantive mail fraud, in violation of 18 U.S.C. § 1341 (Counts 2-16). The indictment also charged five counts of bribery (of Montgomery) in violation of 18 U.S.C. § 666 (Counts 17-21), and six counts of obstruction of justice-- one charging that Shotts made false statements to the grand jury in violation of 18 U.S.C. § 1623 (Count 26) and the remainder based upon witness tampering (Counts 22, 23, 24, 25 and 27), in violation of 18 U.S.C. § 1512. On February 23, 1996, a jury convicted Shotts on Counts 1-16, conspiracy to commit mail fraud and mail fraud, and three of the obstruction of justice counts. [FN2]

> FN2. The court dismissed Counts 23 and 27 upon the government's motion, and Count 25 upon motion for acquittal. The jury acquitted Shotts of Counts 17-21.

Shotts appeals each of his convictions. He challenges the legal sufficiency of the mail fraud counts and the constitutionality of the obstruction of justice counts. He also contends that the evidence was insufficient to convict him on any of the obstruction of justice counts. Finally, he asserts errors in his sentences.

II.

Shotts claims that Counts 1-17 must be reversed because the allegations of mail fraud are insufficient as a matter of law. The

mail fraud statute prohibits the use of the mails in furtherance of "a scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. In McNally v. United States, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court rejected the government's argument that the statute protects intangible rights, and held that the government must allege and prove that the victim was deprived of money or property. Shortly thereafter, the Court further explained that the statute extends to intangible property, but reiterated that Section 1341 is "limited in scope to the protection of property rights." Carpenter v. United States, 484 U.S. 19, 26-27, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (citing McNally, 483 U.S. at 360, 107 S.Ct. 2875).

Shotts was charged in Count 1 with conspiracy to commit mail fraud. The indictment alleges that "[i]t was a part of the conspiracy that the defendant and his co-conspirators would ... cause to be delivered by mail ... business licenses, license renewal notices, [and] payments for licenses...." Counts 2- 17 allege substantive violations of mail fraud and charge that "[i]t was a part of the scheme that the business and the defendant's nominees and agents would then obtain and renew licenses from various municipalities to do business as professional bondsmen." All of the substantive mail fraud counts allege either the mailing of a bail bond license renewal notice with a check or the receipt back in the mail of the license itself.

The government's theory was that these business licenses were property as contemplated by McNally and Carpenter. During the trial, the government argued that the business licenses were property. The government requested and the court instructed the jury that "[a] business license may be considered property." Therefore, Shotts' convictions for mail fraud and conspiracy to commit mail fraud may be affirmed only if the licenses he obtained were "property" under Section 1341. [FN3] We review

de novo a challenge to the legal sufficiency of the indictment. United States v. Shenberg, 89 F.3d 1461, 1478 (11th Cir.1996).

> FN3. The government argues that, because the indictment also alleges that part of the scheme was to obtain money, Shotts' conviction may stand even if these licenses are not property under Section 1341, relying on United States v. Range, 94 F.3d 614 (11th Cir.1996). Even if Range were applicable, we could affirm Shotts' conviction only if we were able to determine with "absolute certainty" that the jury found that one of the purposes of the scheme was to obtain money. Id. at 620 (quoting United States v. Miller, 84 F.3d 1244, 1257 (10th Cir.1996)). The government concedes, however, that in this case there is a "problem" in determining what the jury found because its verdict was a general one. The government argues that this problem is overcome because "it is evident from a reading of the indictment that the main purpose of the scheme was to obtain money." (emphasis added). No authority is cited for the proposition that, if the "main" purpose of a scheme is to obtain money, we can be assured the jury found the defendant guilty of seeking to accomplish it. Nor do we think there is any such authority. A general verdict which may rest upon an insufficient legal theory must be reversed. Griffin v. United States, 502 U.S. 46, 57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); United States v. Martinez, 14 F.3d 543, 553 (11th Cir.1994).

This is an issue of first impression in this circuit and one on which the other circuits are divided. The majority of the circuits have held that a business license is not property and cannot support a Section 1341 mail fraud conviction. See e.g., United States v. Schwartz, 924 F.2d 410 (2d Cir.1991) (export license); United States v. Granberry, 908 F.2d 278 (8th Cir.1990) (school bus driver permits); Toulabi v. United States, 875 F.2d 122 (7th

Cir.1989) (taxi operator license); United States v. Kato, 878 F.2d 267 (9th Cir.1989) (private pilot license); United States v. Murphy, 836 F.2d 248 (6th Cir.1988) (license to conduct bingo game). Most of these courts have reasoned that a business license represents nothing more than an "expression of the government's regulatory imprimatur." Schwartz, 924 F.2d at 418. For example, the Second Circuit held that "[t]he government's power to regulate does not a fortiori endow it with a property interest in the license." Id. at 417. [FN4] On the other hand, some circuits have held that a business license is sufficient property to support a mail fraud conviction. United States v. Salvatore, 110 F.3d 1131,1140 (5th Cir.1997) (video poker license); United States v. Bucuvalas, 970 F.2d 937 (1st Cir.1992) (liquor license); United States v. Martinez, 905 F.2d 709 (3d Cir.1990) (medical license).

> FN4. Many of these courts imply that a license may be some form of property in the hands of the licensee if the license may not be revoked without due process of law. See, e.g., Murphy, 836 F.2d at 253; Granberry, 908 F.2d at 279; Kato, 878 F.2d at 269; Ferrara, 701 F.Supp. at 41.

This division among the circuits is not surprising since neither McNally nor Carpenter define the "property" protected by the mail fraud statute. Both merely teach that the term is "to be interpreted broadly," McNally, 483 U.S. at 356, 107 S.Ct. 2875, but not so broadly as to include "intangible rights." Carpenter, 484 U.S. at 25, 108 S.Ct. 316.

In Carpenter, however, the Supreme Court relied upon two of its prior opinions to hold that confidential business information is property. Id. at 26, 108 S.Ct. 316 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001- 1004, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) and Dirks v. S.E.C., 463 U.S. 646, 653 n. 10, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983)). Both of these opinions

relied exclusively upon state law to define property. In Monsanto, the Court noted the "basic axiom that '[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " 467 U.S. at 1001, 104 S.Ct. 2862 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))).

Three years later, in considering whether a cable television franchise is Section 1341 property, the Seventh Circuit held that, under Carpenter, it must look for the answer in state law. Borre v. United States, 940 F.2d 215, 219 (7th Cir.1991) ("It is logical, therefore, for this court to look to state law in determining whether a cable television franchise constitutes 'property' for purposes of the mail fraud statute"). The First Circuit agrees. Bucuvalas, 970 F.2d at 944 (noting the Supreme Court's "consistent resort to state common law and statutory law defining 'property' "). Two of the three circuits which have since held business licenses to be property have located that definition in state law. Salvatore, 110 F.3d at 1139 (Louisiana's interest in video poker license defined by its Video Poker Law); Bucuvalas, 970 F.2d at 944 (liquor license is property under both Massachusetts statutory and common law). [FN5] We too have implied in dicta that state law defines property for Section 1341 purposes. United States v. Italiano, 894 F.2d 1280, 1285 n. 6 (11th Cir.1990) ("franchises are considered property both generally and under Florida law").

> FN5. The only other circuit to hold a license to be property located that interest in federal decisional law. Martinez, 905 F.2d at 714-15 (medical license).

Resort to state law has, not surprisingly, led to directly conflicting results. For example, in the Third Circuit under

Martinez, fraud in connection with a mailed application for a medical license is a federal crime. In the First Circuit, on the other hand, such a prosecution apparently would be dismissed for failure to state an offense. United States v. Ferrara, 701 F.Supp. 39 (E.D.N.Y.) (mail fraud prosecution dismissed because state has no property interest in medical license), aff'd without opinion, 868 F.2d 1268 (1988). Similarly, one commits mail fraud in the Fifth Circuit if false statements are made in connection with a mailed application for a gambling license, Salvatore, but not in the Ninth Circuit. United States v. Dadanian, 856 F.2d 1391 (9th Cir.1988) (scheme to obtain gambling license did not affect government's interest as a property holder). Fraud in a liquor license application sustains a mail fraud conviction in the First Circuit, Bucuvalas, but apparently not in the Eleventh Circuit. Arrington v. Dickerson, 915 F.Supp. 1503, 1509 (M.D.Ala.1995) (liquor license not property of any sort in Alabama).

These inconsistencies are the result of differences in state-created property interests. What one state regards as property may not be so recognized in another. [FN6]

> FN6. For this reason, conflicting definitions of mail fraud among the various circuits may well be aggravated by conflicting definitions of mail fraud within a circuit. Whether mail fraud is committed in Texas for the mailing of a fraudulent application for a video poker license (if they had video poker) would seem to depend upon whether Texas law creates a property interest in that license. That question is not answered by Salvatore which rests upon Louisiana law.

Furthermore, the split in the circuits on this issue is due not only to differences in state law, but to differences in the licenses under review. "A state's property interest in its licenses derives at least in part from the character of the licenses themselves." Salvatore,

110 F.3d at 1141. A particular license may signify nothing more than an intent to regulate, while another type of license may signify the state's intent to participate in that industry. Id. ("video poker licenses are different than other types of licenses"). A license to drive a taxi, see Toulabi, 875 F.2d at 124, may not be a property interest in any state; a medical license may be considered property in most states. Martinez, 905 F.2d at 715 (Pennsylvania); Medical Ass'n of State of Alabama v. Shoemake, 656 So.2d 863, 867 (Ala.Civ.App.1995); Lowe v. Scott, 959 F.2d 323, 334 (1st Cir.1992) (Rhode Island); Mishler v. Nevada State Bd. of Medical Examiners, 896 F.2d 408, 409 (9th Cir.1990) (Nevada); Watts v. Burkhart, 854 F.2d 839, 842 (6th Cir.1988) (Tennessee); Keney v. Derbyshire, 718 F.2d 352 (10th Cir.1983) (New Mexico).

As state law appears to control the definition of property under Section 1341, what constitutes mail fraud apparently is susceptible to fifty different interpretations. [FN7] What constitutes mail fraud in Alabama may be insufficient to convict in Florida. Whether or not one finds such a result surprising, it is, apparently, the law. [FN8] Therefore, we look to Alabama law to determine whether a municipal bail bond license is government property in Alabama.

> FN7. One final reason for the differences among the circuits is that many of the circuits are not looking at state law to determine whether the charged offense constitutes a deprivation of property. These circuits have looked to federal law for that answer. Dadanian, 856 F.2d at 1392 (Ninth Circuit citing McNally and Carpenter to hold gambling license not property); Murphy, 836 F.2d at 253 (Sixth Circuit citing McNally to hold bingo license not property); Granberry, 908 F.2d at 280 (Eighth Circuit citing Murphy to hold school bus operator permit not property); Kato, 878 F.2d at 269 (Ninth citing Murphy and itself in Dadanian in holding

pilot's license not property); Schwartz, 924 F.2d at 417 (Second Circuit citing Kato, Murphy, Granberry and itself in a prior case not involving a license, United States v. Evans, 844 F.2d 36 (2d Cir.1988), to hold arms export license not property); and Ferrara, 701 F.Supp. at 42 (citing Evans and Murphy to hold medical license not property). It is interesting to note that all of the circuits which rely on federal decisional law conclude that there is no property in a business license; but the three circuits which do find a property right in a license, Bucuvalas (1st Cir.), Salvatore (5th Cir.), and Martinez (3d Cir.) rely on interpretations of specific state laws.

FN8. Defining a federal crime by reference to state law is an unusual feature of the mail fraud statute. Even though the crime in all circuits is use of the mail to obtain property by fraud, one who embarks upon fraud would do well to consult state law to find out if he is obtaining property. If so, it is a federal crime. If the fraud is carefully practiced in a state which defines the thing obtained as not being property, one may escape federal prosecution. We note, however, that "the requirement that statutes give fair notice cannot be used as a shield by one who is already bent on serious wrongdoing." United States v. Griffin, 589 F.2d 200, 207 (5th Cir.1979).

Shotts maintains that a business license is not property in Alabama. It is true that the Supreme Court of Alabama has held that a license to operate a bar or a package store is not property. Ott v. Everett, 420 So.2d 258, 261 (Ala.1982); Ott v. Moody, 283 Ala. 288, 216 So.2d 177 (Ala.1968); O'Bar v. Town of Rainbow City, 269 Ala. 247, 112 So.2d 790 (Ala.1959) ("There is no contract, vested right or property in a license as against the power of a state or municipality to revoke it in a proper case.") In Alabama, "[a] license to engage in the sale of intoxicants is

merely a privilege with no element of property right or vested interest of any kind." Broughton v. Alabama Alcoholic Beverage Control Bd., 348 So.2d 1059, 1060 (Ala.Civ.App.1977) (citing Moody). A federal court in Alabama has recognized that Alabama law creates no protected property interest in a liquor license. Arrington v. Dickerson, 915 F.Supp. 1503, 1509 (M.D.Ala.1995) (citing Broughton).

Neither does Alabama recognize any property interest in a salvage operator's business license. Spradlin v. Spradlin, 601 So.2d 76, 77 (Ala.1992). The Spradlin court reiterated that Alabama recognizes no property interest in any business license as against the right of the state to revoke it. Id. [FN9]

> FN9. On the other hand, Alabama does recognize a property interest in a professional license. Medical Ass'n of Alabama v. Shoemake, 656 So.2d 863, 867 (Ala.Civ.App.1995) (medical license); Averi v. Alabama State Bd. of Podiatry, 567 So.2d 343, 344 (Ala.Civ.App.1990) (medical license); Huckaby v. Alabama State Bar, 631 So.2d 855, 857 (Ala.1993) (law license). The right to practice these professions in Alabama is "constitutionally protected as a valuable property right" which cannot be deprived without due process of law. Huckaby, 631 So.2d at 857. The government apparently concedes that these licenses are not analogous to the bail bond licenses at issue in this case as it does not even cite them, much less argue that they control.

The government does not dispute that Alabama law controls the definition of property under Section 1341. Neither does the government appear to disagree that under Alabama law, no one has a property interest in these bail bond licenses prior to their issuance. [FN10] The government, however, makes the very intriguing argument that "[a]t the moment the licenses were

typed they became property within the meaning of the mail fraud statute." Because the "municipalities still controlled them" at that point, the licenses were government property [FN11] and obtaining them by fraud supports Shotts' mail fraud convictions.

> FN10. The government states, "[t]hus, even under Alabama law, licenses are indeed some form of property, at least once they are issued."
>
> FN11. Apparently the government subscribes to the theory that possession in ninetenths of the law.

The government finds support for its position in several cases which hold that even though an unissued license is not property, it may be property upon issuance. See, e.g., Murphy, 836 F.2d at 253; Granberry, 908 F.2d at 279; Kato, 878 F.2d at 269; Ferrara, 701 F.Supp. at 41. The government's contention appears to be that issuance of a bail bond license occurs at the moment it is typed.

While this is certainly a creative approach, we are not persuaded by it. First of all, none of these cases holds that even an issued license is Section 1341 property. These courts have merely noted that whatever an issued business license might be to the licensee, it is definitely not the property of the state, [FN12] either before or after issuance. Therefore, even if a license becomes property upon being typed, it would not be the state's property. Under these cases, it merely "might" become the property of the licensee.

> FN12. We are aware that these are municipal licenses, but will ignore the distinction between the state and its subdivisions for the purposes of this discussion since we believe it irrelevant to the issue of whether the business licenses are the property of the government.

Furthermore, those courts which distinguish between an issued and unissued license have premised this distinction upon the due process rights which may inure to the licensee upon issuance of the license. Toulabi, 875 F.2d at 125 ("license may be property from the driver's perspective, in the sense that he may not be compelled to surrender the entitlement except on proof of wrongdoing"); Kato, 878 F.2d at 269 ("licenses, while 'property' of the recipient once issued, are not property of the government either before or after they are issued"); Murphy, 836 F.2d at 253-54 ("the bingo license may well be 'property' once issued ... but certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee."). The Supreme Court also recognizes this form of "property" in a license. Mackey v. Montrym, 443 U.S. 1, 10 n. 7, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979) (driver's license); Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) (driver's license); Barry v. Barchi, 443 U.S. 55, 64 n. 11, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (license to train horses). [FN13]

> FN13. The Fifth Circuit has expressed its impatience with the "esoteric" distinction between issued and unissued licenses. Salvatore, 110 F.3d at 1140. We do not agree, however, that the courts making this distinction "provide no justification whatsoever for making the distinction." Id. We also do not agree that the distinction is based upon the idea that a license has "great value in the hands of the licensee but an unissued license has negligible value in the hands of the government." Id. at 1140. The distinction seems quite clearly to be based upon the difference in the rights which attach to the license in the hands of the licensee.

This recognition of a form of property in a license stems from the modern theory that property is a "bundle of rights." [FN14] See United States v. Frost, 125 F.3d 346, 367 (6th Cir.1997).

These rights, however, may exist only in a particular set of hands. The right of due process prior to revocation of a license, for example, exists only in the hands of the licensee. If this is property, it is not the state's property.

> FN14. See Charles A. Reich, 73 Yale L.J. 733 (1964). On the other hand, some courts have understood McNally to direct them to the esoterica of ancient property law to divine whether a particular item is some form of property. See e.g., Bucuvalas, 970 F.2d at 945 (license is a property right analogous to fee simple determinable with a possibility of reverter); Turoff, 701 F.Supp. at 987(discussing whether a license might be an easement in gross). In fact, the Fifth Circuit, in holding a video poker license to be property in the face of specific statutory language to the contrary ("Any license issued or renewed under the provisions of this Chapter is not property ..."), did so because "when determining whether something is 'property' for purposes of the federal mail fraud statute, it is appropriate to look not only to state statutes but also to 'traditional property law.' " 110 F.3d at 1142.

These cases, therefore, do not support the government's theory that Alabama has a property interest in a bail bond license. [FN15] Even if such a license might be considered the licensee's property, from the government's perspective the license is "a promise not to interfere rather than a sliver of property." Toulabi, 875 F.2d at 125.

> FN15. The only other cases cited by the government in support of its position are Bucuvalas, Martinez and United States v. Turoff, 701 F.Supp. 981 (E.D.N.Y.1988). Turoff is inapposite because the New York City taxicab medallions held to be property were "tangible personal property" which had a substantial

market value. 701 F.Supp. at 987. The court in Turoff specifically noted that "[a] mere license, on the other hand, is nothing more than a personal, revocable privilege." Id. at 988. Bucuvalas and Martinez are inapposite because neither interprets Alabama law, much less the status of a bail bond license in Alabama.

The government has offered no other theory of how these licenses might be considered the property of Alabama. [FN16] We conclude that, under Alabama law, a municipal license to operate a bail bonds business is not government property, either before or after being typed. We hold, therefore, that neither the mailing of a fraudulent application for such a license nor the receipt in the mail of the license constitutes the federal crime of mail fraud under 18 U.S.C. § 1341. We reverse Shotts' mail fraud convictions because the jury may have convicted upon that legally insufficient theory. [FN17]

FN16. Nor has the government called to our attention any Alabama statute which creates these licenses so that we might review it to see what interest the state might have in them. Cf. Ward v. United States, 845 F.2d 1459, 1462 (7th Cir.1988) (Illinois statute creates a security interest in a bail bond which might be sufficient to support a mail fraud prosecution).

FN17. See Note 3 supra.

III.

Shotts was convicted in Count 26 of making a false material declaration before the grand jury ("perjury") in violation of 18 U.S.C. § 1623 by stating that he did not "own" a bail bonds business. He argues that this conviction must be reversed because this testimony was "literally true." We review this question of law de novo. Shenberg, 89 F.3d at 1478.

Before the grand jury, Shotts was advised he was a target, and asked the following questions:

Q: Do you own a bail bonds business?

A: No, sir.

Q: Have you been associated in some fashion with a bail bonds business?

A: I would at this time invoke my right of self-incrimination, Your Honor.

Q: All right.

A: I have a client that is a bail bonds company.

Q: Well, have you in the past either been an officer in or had an interest in a bail bonds company, any time prior to today?

A: I would respectfully decline to answer the question on the ground it might tend to incriminate me.

Shotts contends that the question regarding his "ownership" of the bail bonds business was "fundamentally ambiguous" and that, even so, his answer was "literally true." If so, Shotts' conviction for perjury is due to be reversed.

The Supreme Court has held that a perjury conviction under 18 U.S.C. § 1621 cannot be based upon a statement, however misleading or incomplete, that is the "literal truth." Bronston v. United States, 409 U.S. 352, 360, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it is not perjury. Id. at 362.

Bronston has been extended to Section 1623, under which Shotts was convicted. United States v. Abrams, 568 F.2d 411, 421 (5th Cir.1978). In Abrams, the defendant was convicted of violating Section 1623 based upon her testimony before the grand jury in response to questions about what she "would do" rather than what she had actually done. Her answers to the

poorly phrased questions were literally true. The Fifth Circuit reversed her conviction. [FN18]

> FN18. We are, of course, bound by this holding. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Many other courts have reversed convictions based upon "literally true" answers. United States v. Boone, 951 F.2d 1526, 1536 (9th Cir.1991); United States v. Lighte, 782 F.2d 367, 372 (2d Cir.1986); United States v. Eddy, 737 F.2d 564, 567 (6th Cir.1984); United States v. Niemiec, 611 F.2d 1207, 1210 (7th Cir.1980); United States v. Tonelli, 577 F.2d 194, 198 n. 3 (3d Cir.1978); United States v. Paolicelli, 505 F.2d 971, 973 (4th Cir.1974). For example, in Eddy, the Sixth Circuit reversed a Section 1623 conviction where the defendant denied submitting an "official" college transcript and diploma to a government agency. The denial was "literally true" because the defendant had submitted falsified, not official, documents. 737 F.2d at 567-69. In Boone, the defendant denied going through certain company files and taking out documents. His conviction was reversed because the denial was literally true since the discarded documents were kept in different files. 951 F.2d at 1536. Finally, in Tonelli, the government qualified its question by defining a particular term. The defendant's answer to the question so defined was literally true, and the prosecutor made no further reference to any "other concepts" that he might have intended to be included within the question. In reversing the perjury conviction, the Third Circuit observed that "[T]he defendant could be said to have evaded the broad 'other concepts' which the prosecutor wished to probe. A charge of perjury, however, is not a substitute for careful questioning on the part of the prosecutor...." 577 F.2d at 198.

Shotts maintains that his answer, like those above, was literally true. Under Alabama law, a corporation is "owned" by its

shareholders. See American Cast Iron Pipe Co. v. Commerce & Industry In. Co., 481 So.2d 892, 896 (Ala.1985) ("In Alabama, the shareholders are the equitable owners of corporate assets, including real property."); Williams v. North Alabama Exp., 263 Ala. 581, 83 So.2d 330, 333 (1955) ("stockholders owing all the shares of stock of a corporation are the equitable owners of its assets"). See generally H. Henn & J. Alexander, Laws of Corporations at 491 (Practicing Law Institute, 1991) ("shareholders 'own' the corporation ...").

It is undisputed that Shotts never owned any of the shares of stock of the JC Bail Bonds business. His answer to the question whether he "owned" the company was literally true as a matter of both Alabama and general law. [FN19]

> FN19. Ordinarily, absent a finding of fundamental ambiguity, a reviewing court's role is quite limited. Where, however, the defendant's answer is literally true, we need not decide whether the question itself was so fundamentally ambiguous it could not sustain a perjury conviction. Nevertheless, we note that if the government is correct that, in some sense, Shotts "owned" the bail bond business, then the question was fundamentally ambiguous. The government may not send people to prison for failing to correctly guess the government's meaning. See Lighte, 782 F.2d at 374.

Furthermore, Shotts was not asked whether he had "nominees" own the bail bond business for him. When asked whether he was "associated with" or had "an interest in" a bail bonds company, he invoked his Fifth Amendment privilege not to answer. These responses indicate that Shotts was unwilling to perjure himself regarding his association with JC Bail Bonds, and permit an inference that his willingness to answer the "ownership" question was because he knew that under the law he was not the "owner" of the corporation. [FN20] See United States v. Marchisio, 344

F.2d 653, 661 (2d Cir. 1965) (we may consider extrinsic evidence that demonstrates how a declarant interpreted a question).

> FN20. Indeed, had "ownership" of the business led to acquittal instead of conviction, and Shotts had testified that he was the owner of the business, the government might still have charged him with lying to the grand jury.

The government's argument is that Shotts ignores the "context" of his testimony. He was, "in fact," the owner even if he didn't own the stock. He had told others he "owned" the business. When asked before the grand jury if he owned a bail bond business, "he knew ... what was meant by the question." No authority is cited.

A perjury conviction must rest on the utterance by the accused of a false statement; it may not stand on a particular interpretation that the questioner places upon an answer. Lighte, 782 F.2d at 374 (citing Bronston, 409 U.S. at 360, 93 S.Ct. 595). The government cannot require Shotts to interpret its question in a way that is contrary to the law of Alabama, and he may not be convicted of perjury if he does not. Bronston expressly places on the questioner the burden of pinning the witness down to the specific object of the inquiry. Id. As then Chief Justice Burger wrote, "Precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 362, 93 S.Ct. 595. "If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Id. Any "special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Bronston, 409 U.S. at 362, 93 S.Ct. 595.

Furthermore, the prosecutor's purpose must be to obtain the truth. Perjury, of course, thwarts that proper purpose. It must

not be the prosecutor's purpose, however, to obtain perjury, thus avoiding more precise questions which might rectify the apparent perjury.

Under these circumstances, we reverse Shotts' conviction for making a false statement to the grand jury. Even if Shotts' answer was evasive, nonresponsive, intentionally misleading and arguably false, it was literally true and cannot support a conviction under Section 1623.

IV.

Shotts appeals his conviction on Count 24 of the indictment which charges that he violated 18 U.S.C. § 1512(b)(3). This section makes it a crime to:

> knowingly use[ ] intimidation or physical force, threaten [ ], or corruptly persuade [ ] another person, or attempt to do so ... with intent to ... hinder, delay or prevent the communication to a law enforcement officer ... of information relating to the commission or possible commission of a Federal offense....

The indictment alleges that Shotts committed the offense by "corruptly persudad[ing] and attempt[ing] to corruptly persuade an employee of his law office to not tell anything to law enforcement agents investigating Jack Montgomery's activities." Shotts asserts that his conviction on this count must be reversed because the "corruptly persuade" language of Section 1512(b) is unconstitutionally vague and overbroad, and also because the government did not prove the charged crime.

The constitutional claim is one of first impression in this circuit, and we review it de novo. United States v. Paradies, 98 F.3d 1266, 1282 (11th Cir.1996). In reviewing the sufficiency of the evidence, we construe it in the light most favorable to the government, United States v. Tapia, 59 F.3d 1137 (11th Cir.1995), resolving all questions of reasonable inference and

credibility in the government's favor. United States v. Lyons, 53 F.3d 1198 (11th Cir.1995).

Shotts' constitutional attack on Section 1512(b) relies on United States v. Poindexter, 951 F.2d 369, 378 (D.C.Cir.1991). Poindexter had been President Reagan's National Security Advisor. He was accused of lying during the course of a congressional investigation of the Iran-Contra affair and charged under 18 U.S.C. § 1505 which prohibits the making of a false statement to the Congress. The District of Columbia Circuit reversed his conviction, holding that the term "corruptly" as used in Section 1505 was unconstitutionally vague as applied to Poindexter's actions. The court reasoned that the term was so imprecise that "men of common intelligence must necessarily guess at its meaning and differ on its application." Id. at 378.

Shotts urges us to extend the Poindexter view of Section 1505's "corruptly" to Section 1512(b). We have recently declined a similar invitation. United States v. Brenson, 104 F.3d 1267 (11th Cir.1997). In Brenson, the defendant urged us to extend Poindexter to 18 U.S.C. § 1503(a), the omnibus clause of the federal obstruction-of-justice statute, which makes it a crime to "corruptly" endeavor to obstruct the due administration of justice. We refused, holding that Section 1505 and 1503 are too materially different for the construction of one to guide the construction of the other, and that Poindexter is limited to the specific illegal conduct charged in that case. [FN21] Id. at 1280.

> FN21. The challenge in Brenson was to Section 1503(a) as applied in that case. The Fifth Circuit, in binding precedent, had already upheld the use of "corruptly" in Section 1503 against a facial attack. United States v. Howard, 569 F.2d 1331, 1337 n. 9 (5th Cir.1978).

We again decline to extend Poindexter to another section of the obstruction-of-justice statutes. We continue to believe that

Poindexter must be read narrowly, and not as a broad indictment of the use of "corruptly" in the various obstruction-of-justice statutes. [FN22]

> FN22. In fact, the District of Columbia Circuit itself has avoided extending its interpretation of Section 1505 to Section 1512(b). United States v. Morrison, 98 F.3d 619, 629 (D.C.Cir.1996). In upholding Morrison's conviction against the claim that the "corrupt" language in Section 1512(b) is unconstitutionally vague, the court held, instead, that the evidence against him was sufficient to establish that he had persuaded another to violate a legal duty, which, even under Poindexter, satisfies the "corrupt"element of these statutes. Id.

On the contrary, we agree with the Second Circuit that "corrupt" as used in Section of 1512(b) is neither unconstitutionally overbroad or vague. United States v. Thompson, 76 F.3d 442 (2d Cir.1996). In Thompson, the Second Circuit rejected the argument, also advanced here by Shotts, that Section 1512(b) criminalizes persuasion and is, therefore, an impermissible regulation of protected speech. The court noted that Section 1512(b) does not prohibit all persuasion, but only that which is "corrupt." By targeting only such persuasion as is "corrupt," Section 1512(b) clearly limits only constitutionally unprotected speech, and is not, therefore, overbroad. Id. at 452.

Thompson also rejected Shotts' argument that Section 1512(b) is unconstitutionally vague. The Second Circuit noted that the same language in Section 1503(a), the omnibus obstruction-of-justice provision, has long been upheld as meaning with an "improper purpose." See e.g., United States v. Cintolo, 818 F.2d 980, 990-91 (1st Cir.1987); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir.1981); United States v. Fasolino, 586 F.2d 939, 941 (2d Cir.1978); Martin v. United States, 166 F.2d 76, 79 (4th Cir.1948). So defined, "corrupt" is

a scienter requirement which provides adequate notice of what conduct is proscribed. Id. (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). Section 1512(b), concluded the Second Circuit, is not unconstitutionally vague because it forbids only persuasion with an improper purpose.

We are aware that a majority of a panel of the Third Circuit has declined to follow Thompson. United States v. Farrell, 126 F.3d 484 (3d Cir.1997). The majority viewed the application of Section 1503's definition of "corrupt" to Section 1512(b) to be inappropriate because "corruptly" provides the only intent element of Section 1503, while Section 1512 contains explicit intent elements in addition to the term "corruptly." Id. at 489-90. "Thus, because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid." Id. (citing Ratzlaf v. United States, 510 U.S. 135, 141, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)). The majority concluded that "more culpability is required [to violate Section 1512(b)] than that involved in the act of attempting to discourage disclosure in order to hinder an investigation." Id. at 489.

This conclusion drew a strong dissent, however, which noted that both the legislative history of Section 1512 and prior decisions support the Second Circuit's contrary position in Thompson. Id. at 492 (Campbell, J. dissenting). Section 1512's "corrupt persuasion" language was added by Congress in 1988. [FN23] Senator Biden, one of the drafters of the 1988 Amendments, stated at the time that the intention was "merely to include in section 1512 the same protection of witnesses from noncoercive influence that was (and is) found in section 1503." Id. The "motivated by an improper purpose" definition of

"corrupt" in Section 1512(b), then, is correctly informed by Section 1503's long-standing interpretation.

> FN23. The amendment appeared in the Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690, 102 Stat. 4181.

Furthermore, the scienter role played by "corruptly" is not redundant, according to the dissent, because "not all actions taken with the intent to hinder or obstruct justice necessarily violate § 1503 or § 1512." Id. at 493. For example, Section 1512 does not prohibit constitutionally protected speech, even if such conduct has the effect of hindering an investigation. Id. (citing Thompson, 76 F.3d at 452).

We believe that the Second Circuit and the dissent in Farrell have the better reasoned position on this issue. It is reasonable to attribute to the "corruptly persuade" language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose. We are unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b) in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not.

By prohibiting only that persuasion which has an improper purpose, Section 1512(b) does not impermissibly limit protected speech, and provides adequate notice that such persuasion is proscribed. Therefore, we hold that the term "corruptly" as used in 18 U.S.C. § 1512(b) is neither unconstitutionally broad nor vague. [FN24]

> FN24. We have also upheld the use of the term "corruptly" in 18 U.S.C. § 7212(a) against a vagueness attack. United States v. Popkin, 943 F.2d 1535 (11th Cir.1991). In Popkin, we reached the conclusion that

"corruptly" is used for the purpose of " 'forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another.' " Id. at 1540 (quoting United States v. Reeves, 752 F.2d 995 (5th Cir.1985)). Thus defined, we held the term "gives clear notice of the breadth of activities that are proscribed." Id.

Having upheld Section 1512 against Shotts' constitutional attack, we turn now to Shotts' contention that the government did not present sufficient evidence that he corruptly persuaded his secretary, Kandy Kennedy, not to talk to law enforcement agents investigating Montgomery. The evidence offered by the government in support of this charge was the following testimony by Kennedy:

Q: Were there any conversations in the office about the FBI after Mr. Montgomery's house was searched?
A: Yes.
Q: Was Mr. Shotts present?
A: Yes
Q: Did he say anything about the FBI to you?
A: I asked him about it. I asked him.
Q: What did he say?
A: He said just not say anything and I wasn't going to be bothered.

Shotts asserts that this testimony proves only that Kennedy asked Shotts about talking to the FBI and that he observed that if she did not talk to the FBI, she would not be bothered. He maintains that the testimony is insufficient to prove that he threatened or intimidated her, offered her any inducement, or persuaded her in any way not to talk to the FBI.

The government argues that Shotts' use of the term "bother" could have included the possibility of Kennedy's being prosecuted and jailed for her involvement with the bail bond business. In this context, the government contends that Shotts'

comment was an attempt to frighten Kennedy into not talking to the FBI.

The jury was correctly charged that they must find that Shotts acted "knowingly and dishonestly with the specific intent to subvert or undermine the integrity or truth-seeking ability of an investigation by a federal law enforcement officer." The jury heard Kennedy's testimony. While not overwhelming, the jury could reasonably have inferred from this testimony that Shotts was attempting with an improper motive to persuade Kennedy not to talk to the FBI. There was sufficient evidence from which the jury has determined the facts. Therefore, we affirm Shotts' conviction on this count.

V.

Shotts was convicted in Count 22 of instructing his employee, Larry Eddy, to destroy "Jack bonds" in violation of 18 U.S.C. § 1512(b)(2). This section makes is a crime to "corruptly persuade" someone to destroy evidence with the intent to impair its availability for use in an official proceeding.

Shotts has two complaints about his conviction on this count. [FN25] First, he asserts that there was insufficient evidence that the bonds were actually destroyed, and second, that the indictment is deficient because it did not allege the official proceeding in which the destroyed evidence was to be used.

> FN25. We have dealt with Shotts' constitutional challenge to this conviction based upon the alleged vagueness of Section 1512(b)'s "corruptly persuade" language. See Section IV. above.

Larry Eddy did not testify at trial. The evidence on this count was in the testimony of Kandy Kennedy. She testified that after Montgomery's house was searched, the following took place:

Q: What if anything did he say about what had happened.
A: Nothing. We just took the Jack Bonds out of my desk drawer and they were taken away and destroyed.
Q: Who is "we?"
A: I took them out. I either handed them to Jesse or Larry Eddy but Larry Eddy was instructed to destroy them.
Q: Who instructed Larry Eddy to destroy the Jack bonds?
A: Jesse Shotts.

The government offered no further proof that the bonds were actually destroyed. The jury was instructed that it must find that Shotts corruptly persuaded and caused Eddy to destroy the bonds. Shotts contends that the jury was required to find that Eddy actually destroyed the bonds, and that Kennedy's testimony was insufficient to establish this fact. We review these contentions de novo. United States v. Waymer, 55 F.3d 564, 570 (11th Cir.1995).

Neither party has cited any authority to us regarding whether the statute requires that the evidence actually be destroyed. Even assuming that the statute requires such an event to occur, however, Kennedy's testimony is sufficient proof that it did. Kennedy's testimony was that she took the bonds out of her desk drawer, she handed them to "Jesse" or to Eddy, Shotts instructed Eddy to destroy them, and they were "taken away and destroyed." The jury was instructed that they must find that Shotts intended to cause a person to destroy the bonds. Kennedy's testimony can reasonably support that inference. The jury must have drawn this inference because they convicted Shotts on this count. We find no merit to this claim.

Neither are we persuaded that this count is legally insufficient for failure to identify the official proceeding at which the evidence would have been presented. See United States v. Murphy, 762 F.2d 1151, 1153 (1st Cir.1985) (failure to identify in any way the official proceeding did not sufficiently apprize

defendants of charges). Count 22 realleges the Introduction to the indictment. Paragraphs five through seven of the Introduction describe the FBI's investigation and the federal grand jury proceedings before which Jack Montgomery and Shotts were called to testify. Such allegations meet the requirements of Murphy.

VI.

Shotts' convictions were divided into two groups by the Presentence Report and subsequently by the district court at sentencing. The first group contained the convictions on the mail fraud counts and the perjury count. These sentences must be set aside because we have reversed Shotts' convictions on these counts.

The second group contained Shotts' convictions on Counts 24 and 26, the obstruction of justice counts, which we affirm. Shotts' final argument on appeal is that his sentence on these counts was incorrectly calculated under the Sentencing Table. An incorrect calculation under the Sentencing Table is reviewed as an incorrect application of the Sentencing Guidelines. Williams v. United States, 503 U.S. 193, 201, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992). This court reviews de novo the district court's interpretation and application of the guidelines. United States v. Zapata, 139 F.3d 1355, 1357 (11th Cir.1998).

The obstruction of justice counts had an adjusted offense level of 14. With a criminal history category I, the guideline range for an offense level of 14 is 15-21 months. The district court imposed a sixty-month sentence on these counts, to run concurrently with the sixty-month sentence imposed on the separately grouped mail fraud counts. [FN26] Shotts contends that this sentence was erroneous as a matter of law and must be vacated. [FN27]

FN26. The district court rejected any upward departure that might explain the sentence.

FN27. We consider sentence objections raised for the first time on appeal only under the plain error doctrine to avoid manifest injustice. United States v. Hansley, 54 F.3d 709, 715 (11th Cir.1995).

The government argues that because Shotts was convicted on multiple counts, the district court looked to and correctly sentenced under Sentencing Guideline Section § 5G1.2. The government concedes, however that "If these were the only two crimes on which the defendant was convicted, his argument may have some merit." Because we have reversed Shotts' mail fraud and perjury convictions, he stands now convicted of only these two obstruction of justice counts. Accordingly, we shall vacate his sentence on these two counts and remand for re-sentencing on them.

VII.

Counts 1 through 17 of the indictment are insufficient as a matter of law because they allege that Shotts deprived Alabama of its property in the form of a bail bond license and under Alabama law, such license is not property. Count 26 must be reversed because Shotts' alleged false statement to the grand jury was literally true and cannot form the basis for a perjury conviction. Counts 22 and 24 are neither legally nor constitutionally deficient, and the proof on these counts was sufficient to sustain Shotts' convictions on them.

Accordingly, the convictions on Counts 1 through 17 are VACATED and REMANDED. The conviction on Count 26 is REVERSED. The convictions on Counts 22 and 24 are AFFIRMED, but the sentences on these two counts are VACATED and the case is REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6634

D. C. Docket No. CR-95-PT-310-S

Filed
U.S. Court of Appeals
Eleventh Circuit
Oct 02 1998
Thomas K. Kahn
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITIONS FOR REHEARING
(U.S. v. Shotts, 145 F.3d 1289, 11th Cir. 1998).

Before BLACK, Circuit Judge, and HILL and HENDERSON, Senior Circuit Judges.

PER CURIAM:

This case is before the court upon petitions for rehearing filed by both Jesse W. Shotts and by the United States of America. Each party raises certain issues with respect to our opinion in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998). The only issue which we believe merits comment is the government's contention that Shotts may be retried on Counts 1-17 which charge him with conspiracy to commit and the substantive offense of mail fraud.

To sustain a conviction for mail fraud, the government must prove a scheme to obtain money or property by fraud, and that the defendant caused the use of the mails in furtherance of that scheme. *United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996). In this case, the government alleged a scheme both (1) to obtain money by defrauding the customers of a bail bond business, and (2) to obtain property by fraudulently obtaining business licenses from various municipalities of the State of Alabama. We vacated Shotts' conviction because we determined that under Alabama law a business license is not property and his conviction may have rested on that legally insufficient allegation. A general verdict where one of the possible bases of conviction is legally inadequate must be set aside. *Griffin v. United States*, 502 U.S. 52 (1991); *Yates v. United States*, 354 U.S. 298 (1957).

Shotts, of course, may not be retried for mail fraud on the legally insufficient ground that he obtained property, the business licenses, by fraud. He might, however, be subject to retrial on the government's allegation in Counts 1-17 that he obtained money by fraudulent use of the mails or conspired to do so. "[T]he protection of the double jeopardy clause by its own terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). A reversal for legal error is not a termination of jeopardy. *United States v. Miller*,

952 F.2d 866, 872 (5th Cir. 1992). A defendant whose conviction is reversed due to legal error may be retried on those charges. *Montana v. Hall*, 481 U.S. 400 (1987).

Shotts may not be retried, however, if there was insufficient evidence in this trial that he obtained money by fraudulent use of the mails. *Burks v. United States*, 437 U.S. 1 (1978). He claims that there was no allegation nor any evidence which would support a conclusion that he used the mails in furtherance of a scheme to obtain money fraudulently from the bail bond customers. While application for and receipt of the business licenses by mail may not support the government's claim that Shotts used the mails to obtain money by fraud, there may be other evidence to support such a conclusion. Whether there was such evidence and whether it was sufficient to support this verdict such that Shotts may be retried on the legally sufficient allegations contained in Counts 1-17 is an issue that was neither briefed nor adequately argued on appeal, and we shall not undertake a review of this record *sua sponte*.

It is for this reason that we granted the government's motion to clarify our judgment on appeal. On remand, the district court may determine whether the evidence was sufficient to permit retrial on the government's allegations that Shotts obtained money by fraudulent use of the mails or conspired to do so.

With the foregoing explanation, the petitions for rehearing are denied.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6634

D. C. Docket No. CR-95-PT-310-S

Filed
U.S. Court of Appeals
Eleventh Circuit
Oct 02 1998
Thomas K. Kahn
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON SUGGESTION OF REHEARING EN BANC
(U.S. v. Shotts, 145 F.3d 1289, 11th Cir. 1998).

Before BLACK, Circuit Judge, and HILL and HENDERSON, Senior Circuit Judges.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR JUDGE

119 S.Ct. 1111 (Mem)
143 L.Ed.2d 108, 67 USLW 3364, 67 USLW 3415, 67 USLW 3538, 67 USLW 3541
(Cite as: 525 U.S. 1177, 119 S.Ct. 1111)

H

Supreme Court of the United States

Jesse Woodrow SHOTTS, petitioner,
v.
UNITED STATES.

No. 98-837.

March 1, 1999.

Case below: 145 F.3d 1289.

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 29 2000
THOMAS K. KAHN
CLERK

No. 99-10585
Non-Argument Calendar

D. C. Docket No. 95-00310-CR-PT-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant.

No. 00-10132
Non-Argument Calendar

D. C. Docket No. 95-00310-CR-PT-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee-
Cross-Appellant,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Alabama

(November 29, 2000)

Before TJOFLAT, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

In this criminal appeal, we affirm the convictions but vacate the sentence and remand. Jesse Woodrow Shotts appeals his 19-month sentence imposed for tampering with a witness, victim or informant in violation of 18 U.S.C. § 1512(b)(2). On appeal, Shotts argues that his convictions must be reversed because: 1) the indictment was constructively amended by the appeals court, and 2) the district court, after trial, redacted the original indictment: an act, appellants says, constituted an amendment to the indictment. The government cross appeals, arguing that the district court erred in failing to apply section U.S.S.G. § 2J1.2(c) to compute an alternate guideline range when sentencing for obstruction of justice.

Jesse Shotts, a defense lawyer in Birmingham, Alabama, ran a bail bond business called J & J Bonding Co. ("J&J"). Shotts closed

J&J after the Alabama Supreme Court passed a rule that prohibited lawyers from having an interest in a bail bond business. J&C's Bail Bonds, Inc. ("J&C's") was then formed and was technically owned by a number of people under the control of Shotts.

As a part of J&C's business, Shotts obtained, otherwise blank, signed bonds from Judge Jack Montgomery.[1] That Shotts bribed Judge Montgomery to obtain these bonds was alleged.

In 1992, after an investigation, the FBI executed a search of Judge Montgomery's house finding $31,000.00. After the search of Montgomery's home, Shotts directed his employees to destroy evidence and to refrain from talking to investigators. During the grand jury investigation, Shotts testified that he did not own J&C's.

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[1]Shotts was then able to present these bonds to correction officials to obtain the release of offenders without making his company the surety on the bonds. J&C Bail Bonds would not be liable if the defendant then failed to appear at trial.

Shotts was indicted, charged and convicted of several criminal counts; the convictions were appealed to this court. See, United States v. Shotts, 145 F.3d 1289, 1303 (11th Cir. 1998) ("Shotts 1"). Then, on remand in the district court, Shotts -- in the light of our opinion -- filed motions for a new trial/motion for acquittal and a motion to dismiss the indictment. The district court denied both motions, and Shotts immediately appealed to this court.[2] We dismissed the appeal for lack of jurisdiction. Shotts then filed his motion to reconsider with this court. This motion was pending when the district court dismissed the mail fraud and conspiracy to commit mail fraud charges and resentenced defendant to 19 months for the convictions on the two counts of violation of 18 U.S.C.

[2]The appeal asserted that the alleged constructive amendment by this court is plain error, that the redacting of the indictment by the district court is plain error, and that the government had not presented sufficient evidence for conviction on the mail fraud charges.

1512(b)(2). Shotts filed a timely appeal of his 19 month sentence. The government cross appealed the application of the Sentencing Guidelines.

Shotts' two appeals have been consolidated and are addressed in this opinion along with the government's cross appeal. The only counts of the indictment alive before us on appeal are counts 22 and 24.

The Appeals Court's Constructive Amendment of the Indictment

Shotts argues that we constructively amended the indictment in our decision in Shotts I, requiring reversal of Shotts' conviction on counts 22 and 24. In Shotts 1, we reversed Shotts' perjury conviction concluding that his negative answer to the question of whether he owned J&C's was -- strictly speaking -- true. United States v. Shotts, 145 F.3d at 1299. Shotts argues that, because of

that conclusion in Shotts 1, paragraph four of the indictment[3] is legally erroneous and contrary to Alabama law, and that because paragraphs one through seven of the indictment are incorporated in every count of the indictment, each count is defective and must be dismissed.

Shotts' claim is without merit. No amendment was made to the indictment; and even if some change was made to the terms of the indictment, the terms affect a part of the indictment unnecessary to the allegations of the offense proved.

In Shotts 1, we were ruling on a challenge to a perjury conviction. Id. In such cases literal truth is enough to relieve the defendant of conviction. Bronston v. United States, 409 U.S. 352, 360 (1973). We held that Shotts could not be convicted for answering in the negative the specific question "Do you own a bail

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[3]The fourth paragraph of the indictment includes a sentence asserting that Shotts "owned and operated his bailbonds business, through agents and intermediaries..."

bonds business?" The indictment, however, speaks of "owning and operating . . . through agents and nominees." The idea of owning through agents and nominees is different than the statutory ownership of a corporation's stock that we determined in Shotts I.

Moreover, because the issue of ownership is not material to counts 22 and 24 -- which charge violations of 18 U.S.C. § 1512(b)(2) -- any change in the indictment that may have occurred on the issue of ownership is unimportant. "A part of an indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as a useless averment that may be ignored. United States v. Miller, 471 U.S. 130 136 (1985) (citing Ford v. United States, 273 U.S. 593 (1926)). The obstruction-of-justice counts of the indictment did not require that the government prove Shotts owned the bail bond business for conviction; so an averment that he owned the bail bond business was "merely surplusage and may be rejected." Ford, 273 U.S. at 602. We reject

Shotts' claim that our determination in Shotts 1 constituted amendment of the indictment requiring dismissal of his convictions under counts 22 and 24.

The District Court's Redaction of the Indictment

Shotts next contends that the district court improperly redacted the indictment resulting in an amendment requiring dismissal of the convictions on counts 22 and 24. At Shotts' request the district court changed the wording in paragraph five and six of the indictment, which described the investigation in which the evidence would have been used.[4]

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[4]Paragraph five was written this way: "In late 1992, the Federal Bureau of Investigation conducted an undercover investigation of allegations that Montgomery had taken bribes from lawyers and bailbondsmen to release prisoners on bond and to guarantee certain dispositions of their cases." The district court removed all words after the word "bribes." Paragraph six stated, "On the evening of October 22, 1992, the Federal Bureau of Investigation executed a search warrant at Montgomery's residence. Large sums of money were seized, including marked money previously offered as bribes." The court eliminated the words after "seized."

The Supreme Court has said reversible error occurs when the terms of the indictment are amended by broadening the possible bases for conviction from that which appeared in the indictment. See, Miller, 471 U.S. at 134 (1985). In this case, however, the changes to the indictment (made at the request of Shotts) did not broaden the possible bases for the conviction of witness tampering.

Paragraphs five and six described the proceedings at which the evidence would have been used. In Shotts I we held that the indictment gave sufficient identification of the official proceeding in which the evidence would have been used. See, United States v. Murphy, 762 F.2d 1151, 1153. The change to the paragraphs made by the district court did not affect that description. Shotts was properly convicted of the counts alleged in the indictment.

The District Court's Application of the Sentencing Guidelines

The government cross appeals, saying that the district court erred in re-sentencing Shotts for counts 22 and 24. At sentencing the government objected, contending that the cross referencing provision in Section 2J1.2(c) -- which would have resulted in a longer sentence for Shotts -- was not used when it should have been.

Shotts was sentenced under § 2J1.2(a) of the Guidelines which provides a base level offense of 12 for obstruction of justice. The district court then applied a two level upward adjustment pursuant to § 3B1.1(c) for Shotts' role as the supervisor or organizer in the offense resulting in an offense level of 14.

Section 2J1.2(c) of the Guidelines, however, directs the district court to apply § 2X3.1 when the obstruction of justice charge involves a criminal offense and when the resulting offense level would be higher than that applied under 2J1.2(a). The

government properly objected to the guideline application. Because the district court did not apply the proper sections of the Guidelines, we must remand for re-sentencing.

We affirm Shotts' convictions under counts 22 and 24 of the indictment, but vacate the sentence and remand for the sole purpose of re-sentencing.

AFFIRMED IN PART.

VACATED AND REMANDED IN PART.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 17 2001
THOMAS K. KAHN
CLERK

No. 99-10585-FF & 00-10132-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, _____F.2d_____).

Before: TJOFLAT, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

CRD-42
(6/95)